

act in a vacuum — without knowing whether any implementing technology will be capable of meeting the standards established. The Commission knows from experience that the premature establishment of timing standards can result in a later flood of waiver petitions where the technology, once developed, proves incapable of meeting the standard established.⁷⁶

Accordingly, assuming *arguendo* that the adoption of CALEA delivery time standards were appropriate, the Commission should defer establishing any standards until CALEA-compliant equipment is available so it can base its decisions on record evidence. It is important to note that neither manufacturers in developing their CALEA solutions nor carriers in deploying their solutions have any incentive to add unnecessary delay in the delivery of the information to which law enforcement is legitimately entitled.

Finally, national delivery time standards are not necessary to protect law enforcement's interests. CALEA imposes on each carrier the obligation to deliver call-identifying information "before, during, or immediately after the transmission of a wire or electronic communication."⁷⁷ If any law enforcement agency believes any carrier is not

⁷⁶ For example, the Commission established certain 800 database access standards for GTE and the Bell companies. However, once the technology was developed, none of the companies could meet the standard, requiring the submission of numerous waiver petitions. *See, e.g., Ameritech Waiver Order*, 7 FCC Rcd 4969 (1992); *Bell Atlantic Waiver Order*, 7 FCC Rcd 4973 (1992); *NYNEX Waiver Order*, 7 FCC Rcd 5014 (1992); *Southwestern Bell Waiver Order*, 7 FCC Rcd 5019 (1992); *BellSouth Waiver Order*, 7 FCC Rcd 5035 (1992); *GTE Waiver Order*, 7 FCC Rcd 5039 (1992); *Pacific Telesis Waiver Order*, 7 FCC Rcd 5042 (1992); *United Tel. Cos. Waiver Order*, 7 FCC Rcd 5046 (1992); *U S WEST Waiver Order*, 7 FCC Rcd 5050 (1992); *Nevada Bell Waiver Order*, 9 FCC Rcd 1847 (1994); *Pacific Bell and BellSouth Waiver Order*, 11 FCC Rcd 4436 (1995).

⁷⁷ 47 U.S.C. § 1002(a)(2)(A).

adequately fulfilling its statutory delivery obligation, it may seek an enforcement order using the procedure Congress has established.⁷⁸

D. Automated Delivery of Surveillance Status Messages (Punch List Items 6, 7, and 9)

The FBI contends that the industry standard is deficient because, while CALEA provides that a carrier “shall ensure” that its equipment is capable of conducting interceptions, the standard does “not recognize any affirmative obligation on the part of carriers to assure law enforcement that the carrier’s equipment is operational.”⁷⁹ The FBI therefore wants the Commission to require industry to assure law enforcement that carrier equipment is operational, specifically requesting that carriers be mandated to provide the following three automated status messages:

1. A Continuity Tone (Punch List Item 7). This signal would alert law enforcement if the facility used for the delivery of call content interception has failed or lost continuity.⁸⁰
2. A Surveillance Status Message (Punch List Item 6). This message would indicate that the interception is working correctly and is accessing the correct service.⁸¹

⁷⁸ See 18 U.S.C. § 2522.

⁷⁹ FBI Petition at 53 ¶ 96. If the obligation is imposed by statute, there is no reason for the standard to repeat the obligation.

⁸⁰ See FBI Petition at 54 ¶ 98; FBI Proposed Rule 64.1708(h).

⁸¹ See FBI Petition at 54-55 ¶¶ 99-100; FBI Proposed Rule 64.1708(f). In particular, the FBI wants to receive such status messages “whenever a surveillance is activated, updated, or deactivated” and “periodically from once every hour to once every 24 hours.” FBI Proposed Rule 64.1708(f)(1) and (2).

3. A Feature Status Message (Punch List Item 9). This message would notify law enforcement of any change in a subject's subscribed-to features.⁸²

In making this request, however, the FBI readily acknowledges its proposal is “not the only means by which the requirements of [CALEA] could be satisfied” and that carriers could comply with CALEA “by a variety of means.”⁸³

There is no basis for the Commission to require carriers to provide these automated status messages where, as the FBI itself recognizes, there are “a variety of means” by which a carrier can meet its statutory obligation to “ensure” that its network is capable of intercepting and delivering communications and call-identifying information.⁸⁴ As noted above, Congress made abundantly clear that CALEA “leaves it to each carrier to decide how to comply.”⁸⁵ For the Commission to adopt the FBI's proposed rules would remove by regulation the very flexibility Congress decided by statute that carriers should enjoy.

Moreover, there is a substantial question whether these capabilities, even if consistent with CALEA, can be provided by “cost-effective methods.”⁸⁶ One of AirTouch's vendors has advised AirTouch that the cost to develop punch list item number six (surveillance status message) would be “exorbitant.”

AirTouch particularly objects to the FBI's demand that CMRS providers be responsible for providing a continuity tone over the delivery circuits law enforcement agencies

⁸² See FBI Petition at 56-57 ¶¶ 101-03; FBI Proposed Rule 64.1708(g).

⁸³ FBI Petition at 53-54 ¶ 97.

⁸⁴ See 47 U.S.C. § 1002(a).

⁸⁵ House Report at 23.

⁸⁶ See 47 U.S.C. § 1006(b)(1).

will use. In most circumstances, law enforcement will obtain their delivery circuits from a landline local exchange carrier (“LEC”). In these circumstances, the responsibility to ensure that the delivery circuit is operational should fall on the LEC, not the CMRS provider, which has no control over either the circuits in question or over the LEC owning and providing the circuits.

E. Standardized Delivery Interface (Punch List Item 8)

The FBI asks the Commission to require that industry use “no more than five” delivery interface protocols, although it freely acknowledges that CALEA does “not obligate carriers to use any particular interface protocol.”⁸⁷ The Department of Justice has independently determined that CALEA does not require carriers to provide this capability to law enforcement.⁸⁸

Once again, there is no basis in law for the Commission to impose limits on carriers when Congress designed CALEA to give carriers flexibility in their CALEA implementation.⁸⁹ As the FBI has itself recognized, “[t]his point is important because, as the Commission well knows, the industry is not monolithic. Different manufacturers and carriers have different capabilities and needs.”⁹⁰

Besides, even if delivery interfaces were an appropriate subject for Commission regulation, adoption of such a regulation at this time would be premature — because, without

⁸⁷ FBI Petition at 57-58 ¶¶ 104-05; FBI Proposed Rule 64.1708(j).

⁸⁸ See Letter from Stephen R. Colgate, Assistant Attorney General, to Tom Barba, Steptoe & Johnson, at 3 (Feb. 3, 1998). In this letter, DOJ also determined that CALEA “does not . . . require separated delivery” — punch list item 11. *Id.* Although DOJ also stated that the remaining nine punch list capabilities “are clearly within the scope of CALEA,” DOJ regrettably did not share its legal analysis for this opinion. *Id.* at 2.

⁸⁹ See, e.g., House Report at 23 (“The legislation leaves it to each carrier to decide how to comply.”).

⁹⁰ FBI Comments at 10 ¶ 18 (May 8, 1998).

CALEA-compliant equipment, it is not now known how many interfaces will be developed, and whether this will even be a problem.⁹¹ It is also important to point out that carriers often use equipment made by different manufacturers, and industry thus has an equally compelling interest in minimizing the number of interfaces as well.

IV. The Commission Should Confirm That, Consistent With CALEA, Carriers Remain Free to Determine How to Implement CALEA's Capability Requirements

The FBI asks the Commission to adopt CALEA implementation rules that would require all carriers to implement the industry standard as the Commission may modify.⁹² The Commission should reject this request because it is inconsistent with the statutory scheme.

In CALEA, Congress authorized industry to develop implementing standards, and it gave industry an incentive to adopt and use such standards by enacting the "safe harbor" provision.⁹³ However, Congress further made clear that nothing in CALEA prevents a carrier

⁹¹ Moreover, even if the Commission were to assume that a problem were to arise, the FBI does not explain how the Commission would enforce any rule which it may adopt. Assume, for example, the Commission adopts a limit of five interfaces, yet a carrier uses equipment made by six vendors, each of which was compelled to use a different interface protocol because of the design of its equipment. How should the Commission decide which vendor must attempt to change its interface and begin using one of the interfaces used by one of its competitors?

⁹² See FBI Proposed Rule 64.1706 ("[C]arriers *shall ensure* that their equipment, facilities, or services . . . provide the electronic surveillance assistance capabilities defined in the electronic surveillance interface standards set forth in Sections 64.1707 and 64.1708, below.") (emphasis added). Importantly, the FBI's proposed rule is admittedly overbroad, because it applies to all carriers whereas the industry "J-standard" applies only to "carriers providing wireline, cellular, and personal communications services." FBI Petition at 4 ¶ 3.

⁹³ 47 U.S.C. § 1006(b) ("A telecommunications carrier shall be found to be in compliance with the assistance capability requirements . . . if the carrier . . . is in compliance with publicly available technical requirements or standards adopted by an industry association or standard-setting organization . . .").

from adopting a different technical solution so long as it meets the assistance capability requirements:

The legislation leaves it to each carrier to decide how to comply.

* * * Compliance with the industry standards is voluntary, not compulsory. Carriers can adopt other solutions for complying with the capability requirements.⁹⁴

Requiring carriers to implement the industry standard, as the FBI proposes, is thus plainly inconsistent with CALEA. The Commission should, therefore, confirm that any rules it may adopt in this proceeding are guidelines only and that carriers are free to pursue alternative solutions in meeting their obligations under CALEA. If law enforcement believes that a particular carrier's practices are unreasonable, it can invoke the procedure established in CALEA: seek an enforcement order.⁹⁵

V. If the Commission Determines That the Industry Standard Is Deficient, It Should Remand to TR-45.2 the Task of Developing Implementing Technical Standards

AirTouch, like the rest of industry, believes that the current industry standard, J-STD-025, fully meets (and possibly exceeds) CALEA's requirements and that the FBI's punch list involves capabilities which are beyond, and in some cases flatly inconsistent with, CALEA. Importantly, Commission affirmation of the industry standard would enable industry to implement CALEA most quickly because vendors would not require additional time to develop punch list capabilities and to change their J-standard work to incorporate these modifications.

If, however, the Commission determines that the industry standard is deficient in any way, it should remand the task of developing implementing technical standards to TR-45.2,

⁹⁴ House Report at 23 and 27.

⁹⁵ See 18 U.S.C. § 2522.

the TIA standards subcommittee which adopted J-STD-025. This subcommittee is equipped to ensure that any modifications which the Commission may order are consistent with all existing standards and protocols, including the new Lawfully Authorized Electronic Surveillance (“LEAS”) protocol which TR-45.2 developed specifically to implement CALEA.

VI. A Recommended Approach for Developing A New Compliance Date

CALEA specifies that, as a part of this rulemaking, the Commission provide “a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under [the assistance capability provision] during any transition period.”⁹⁶ As the Commission is aware, it will be some time before industry is capable of meeting the industry standard. Industry obviously will require additional time if, as a result of this proceeding, the Commission modifies this standard in any way.

The FBI proposes that the Commission require industry to begin providing the capabilities specified in the Commission’s order “18 months after the date of the Commission’s decision.”⁹⁷ In making this recommendation, however, the FBI does not explain why it believes 18 months is sufficient.

In fact, the FBI’s proposal is unrealistic, and industry has advised the Commission as part of the extension comment cycle that three steps must be undertaken before carriers will be in a position to comply with the Commission’s order in this proceeding. First, as discussed

⁹⁶ 47 U.S.C. § 1006(b)(5). Importantly, Congress did not impose any time limits with respect to a new compliance date, thus affording the Commission maximum flexibility to ensure that CALEA can be implemented in a cost-effective manner.

⁹⁷ FBI Petition at 63 ¶ 114.

above, the matter should be referred to TR-45.2 to develop implementing technical standards; this is an important step to standardize capabilities and to minimize implementation costs.

Second, manufacturers must design and develop modifications which comply with the Commission's order and implementing standards and thereafter test their modifications in an "first office application." Finally, carriers need time to acquire, install, and test the CALEA modifications in their respective networks. It is readily apparent that the FBI's 18-months-from-Commission-order proposal will not be adequate.

The length of time industry will need to comply with the Commission's order will depend largely on the order itself — namely, the number of modifications made, if any, and which capabilities are added, if any. Rather than establish a new compliance deadline without an adequate record, *and* assuming the Commission in the interim grants the pending requests to extend the current AirTouche by two years, AirTouch recommends that the Commission not establish a new deadline in its order, but that it rather seek additional comment after the order is released, so industry can propose a realistic and specific deadline based on that order.⁹⁸

Conclusion

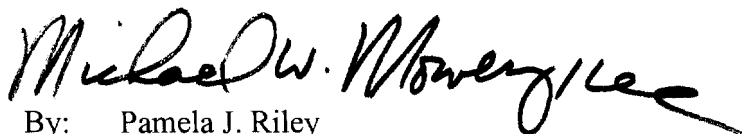
For the foregoing reasons, AirTouch respectfully requests that the Commission deny in its entirety the FBI petition for rulemaking. If, however, the Commission grants the petition in whole or part, AirTouch recommends that the Commission refer to the industry standards committee, TR-45.2, the task of developing technical standards which implement the Commission's order. Finally, assuming the Commission extends the current compliance

⁹⁸ Assuming the current compliance date has been extended at the time the Commission's "standards" order is released, AirTouch recommends that opening comments be filed not earlier than 90 days after the release of the order so vendors and carriers have an opportunity to study the impact of the order.

deadline (of October 25, 1998), AirTouch recommends that the Commission seek additional public comment concerning what appropriate new compliance deadline it should establish in conjunction with any order modifying CALEA capabilities.

Respectfully submitted,

AIRT TOUCH COMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Michael W. Mowery". The signature is fluid and cursive, with a long horizontal stroke at the end.

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May 20, 1998

CERTIFICATE OF SERVICE

I, Jo-Ann G. Monroe, hereby certify that I have on this 20th day of May, 1998
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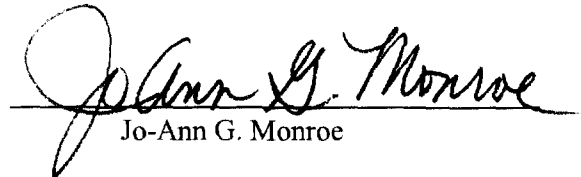
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